

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

ROBERTO DURAND,

Case No. 3:21-cv-00492-MMD-CLB

Plaintiff,

## ORDER

MR. VINSON,

Defendant.

Plaintiff, who is incarcerated in the custody of the Nevada Department of Corrections (“NDOC”), has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983. (ECF Nos. 1-1).<sup>1</sup> The Court notes a potential exhaustion issue.

Under the Prison Litigation Reform Act (“PLRA”), “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). The exhaustion requirement is mandatory and unexhausted claims cannot be brought in court. *Booth v. Churner*, 532 U.S. 731, 741 (2001); *Jones v. Bock*, 549 U.S. 199, 211 (2007).

“In a few cases, a prisoner’s failure to exhaust may be clear from the face of the complaint. However, such cases will be rare because a plaintiff is not required to say anything about exhaustion in his complaint.” *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014). The “failure to exhaust is an affirmative defense under the PLRA” and “inmates are not required to specially plead or demonstrate exhaustion in their complaints.” *Jones*, 549 U.S. at 216. However, if it later comes to light that the plaintiff failed to exhaust his administrative remedies on the claims raised in the complaint, the district court will dismiss the unexhausted claims from the case. *Id.* at 219-21 (holding

<sup>1</sup> Plaintiff has not filed an application to proceed *in forma pauperis* or paid the \$402 filing fee. The Court previously issued an order requiring Plaintiff to file a complete application to proceed *in forma pauperis* or pay the full \$402 filing fee by January 31, 2022. (ECF No. 4.)

1 that the district court may dismiss the unexhausted claims from the complaint but may  
 2 proceed with the exhausted claims). The plaintiff must exhaust his or her claims before  
 3 filing a lawsuit and cannot finish the exhaustion process during the case. *See McKinney*  
 4 *v. Carey*, 311 F.3d 1198, 1199-1200 (9th Cir. 2002) (holding that the “district court must  
 5 dismiss an action involving prison conditions when the plaintiff did not exhaust his  
 6 administrative remedies prior to filing suit but [was] in the process of doing so when a  
 7 motion to dismiss [was] filed”).

8 In the complaint, Plaintiff states that the alleged violations took place from  
 9 November 1, 2021, through November 30, 2021. (ECF No. 1-1 at 1.) On November 29,  
 10 2021, Plaintiff initiated this action. (*Id.* at 9.) It seems unlikely that Plaintiff would have  
 11 been able to fully exhaust his administrative remedies during that period. If Plaintiff needs  
 12 to finish exhausting his administrative remedies, he may choose to file a notice of  
 13 voluntary dismissal without prejudice<sup>2</sup> by January 31, 2022. The Court notes that if  
 14 Plaintiff chooses to proceed with this case, he may be required to pay the full \$402 filing  
 15 fee, which includes the \$350 filing fee and \$52 administrative fee, even if the Court later  
 16 dismisses this case.

17 It is therefore ordered that, if Plaintiff chooses to file a notice of voluntary dismissal  
 18 without prejudice, he may do so by January 31, 2022. If Plaintiff chooses not to voluntarily  
 19 dismiss this action by that date, and he files a complete application to proceed *in forma*  
 20 *pauperis* or pays the full \$402 filing fee by January 31, 2022, this case will proceed with  
 21 the screening process.

22  
 23 DATED THIS 3rd day of December 2021.

24  
 25   
 26  
 27 UNITED STATES MAGISTRATE JUDGE

28  
 29  
 30 <sup>2</sup> A dismissal without prejudice means that a plaintiff does not give up the right to  
 31 refile the case with the Court, under a new case number, when the plaintiff has exhausted  
 32 his or her administrative remedies.